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OSGOODE HALL REVIEW OF LAW AND POLICY

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ARTICLE

STATUTORY WILLS:

A CASE FOR GRANTING ONTARIO COURTS THE AUTHORITY TO PASS STATUTORY WILLS ON BEHALF OF PERSONS LACKING TESTAMENTARY CAPACITY

Hassan Chaudhary[♦]

In Ontario, individuals have the freedom to create their own will. However, a person lacking testamentary capacity cannot draft an enforceable will. For those individuals who lack testamentary capacity and thereby draft an unenforceable will or simply pass away intestate, their estate is distributed according to the laws of intestacy, which can result in an undesirable outcome. An unjust distribution of an individual's estate can, nevertheless, be avoided by providing Ontario courts with the ability to make, change, or revoke a will.

I

INTRODUCTION

Testamentary freedom is an idea that is highly valued and strongly embraced in Ontario. It provides testators, also known as will-makers, with the freedom to create their own will. As a result, a

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testator can determine how his or her estate will be divided, subject to practical legal limitations.¹ For a will-maker to exercise this ability, however, he or she must possess testamentary capacity. An important criterion for determining testamentary capacity was developed by the English courts in *Banks v Goodfellow*.² It requires a will-maker to have an understanding of the nature of his or her will, recognition of his or her own assets, and an awareness of who may reasonably become a beneficiary of the estate. While medical professionals may be called upon to help make these determinations, the fundamental question is of a legal nature. If a court holds that a testator did not possess testamentary capacity at the time the will was drafted, it shall be invalidated. Thus, a person lacking testamentary capacity cannot draft an enforceable will.

Some adults may lose testamentary capacity due to severe illness or injury while others may never possess testamentary capacity during their lifetime as a result of developmental delays. The relevant legal question that arises in these scenarios is whether Ontario courts should be given the power to create statutory wills for these individuals. By conferring such authority, Ontario's judiciary would be able to make, change or revoke the will of an individual who does not meet the requisite mental threshold. This paper will argue that Ontario courts should be given such authority. In developing this argument, the relevant Ontario law will be examined, followed by the history of the concept and a comparative analysis of how Commonwealth jurisdictions have addressed statutory wills. After exploring arguments in favour of and against such a scheme, this paper will put forward a proposal outlining specific recommendations for legislative reform authorizing Ontario courts to pass statutory wills.

¹ *Succession Law Reform Act*, RSO 1990, c S 26, ss 57-60 [*SLRA*]; *Family Law Act* RSO 1990 ss 29-39 [*FLA*].

² *Banks v Goodfellow* (1870), LR 5 QB 549 (Eng QB).

II

CURRENT LAW IN ONTARIO

In Ontario, the *Substitute Decisions Act* provides guidance and relief for individuals that are not mentally capable of making decisions regarding their property or personal care. The Act allows for the appointment of a substitute decision-maker to act on behalf of the person lacking testamentary capacity.

If an individual is unable to make property-related decisions, a substitute decision-maker may be appointed in one of three ways. First, the original decision-maker may appoint a continuing power of attorney via a written document³ provided that this is done before the original decision-maker loses capacity.⁴ Second, a statutory guardian may be appointed.⁵ This typically occurs when the original decision-maker has not chosen a continuing power of attorney, is placed in a psychiatric facility, and is determined to be incapable of managing his or her property.⁶ In these situations, the statutory guardian of any property will be the Public Guardian and Trustee (PGT).⁷ A family member or another person may apply to the PGT to assume the role.⁸ Finally, a court-ordered guardian can be appointed.⁹ In order to be selected as a guardian, an individual would have to apply to a court. Prior to approving an application, the court would have to be certain that the original decision-maker is incapable of making property-related decisions.¹⁰

The appointed attorney or guardian is provided with a broad set of powers. Typically, he or she is authorized to do anything the original decision-maker could have with respect to the estate's finances.¹¹ However, attorneys and guardians are expressly forbidden from making, changing or revoking the incapacitated person's will for

³ *Substitutes Decisions Act, 1992*, SO 1992, c 30, s 7 [*SDA*].

⁴ *SDA, ibid*, s 8.

⁵ *SDA, ibid*, s 15.

⁶ *SDA, ibid*, s 15-16.

⁷ *SDA, ibid*.

⁸ *SDA, ibid*.

⁹ *SDA, ibid*, s 22-25

¹⁰ *SDA, ibid*.

¹¹ *SDA, ibid*, ss 7(2), s 31(1).

two reasons.¹² First, individuals are restricted from performing acts that another is legally required to perform.¹³ The crafting of wills – similar to marriage or serving a prison term – is placed in this category due to its intimate nature and the need for a subjective assessment that could not be duplicated by another. Second, the appointed attorney or guardian is legally obligated to act in the best interest of the incapacitated person, and thus allowing he or she to alter the will could cause a conflict of interest.¹⁴

Like substitute decision-makers, Ontario courts under the current legislative scheme have limited authority to alter wills. Indeed, assuming dependents – if any – have been adequately provided for and there are no apparent public policy concerns, the courts cannot make, change or revoke a will on behalf of a person lacking testamentary capacity.¹⁵ However, the reasons as to why a substitute decision-maker may not alter a will do not apply to the judiciary and are thereby immaterial. In establishing this claim, context is useful and instructive. Thus, a historical perspective will be provided followed by an examination of jurisdictions that allow for statutory wills.

III

CONCEPTUAL ORIGINS OF STATUTORY WILLS

Making legal decisions on behalf of an incapacitated individual regarding the division of their estate has its origins in the laws of lunacy.¹⁶ Statutory wills emerged when English courts began focusing on how a lunatic's surplus income could best be distributed.¹⁷

¹² *SDA, ibid.*

¹³ Dawn D Oosterhoff, "Alice's Wonderland: Authority of an Attorney for Property to Amend a Beneficiary Designation" (2002) 22 ETPJ 16 at 18-19.

¹⁴ *Ibid.*

¹⁵ *SLRA & FLA, supra* note 1. Certain public policy concerns where the court would set a will aside include findings that (i) the testator was unduly influenced (i.e. coerced), (ii) the will failed to comply with the requirements of due execution, (iii) the testator lacked knowledge of the contents of the will and did not approve its content, and (iv) evidence of fraud or forgery.

¹⁶ Rosalind F Croucher, "An Interventionist, Paternalistic Jurisdiction: The Place of Statutory Wills in Australian Succession Law" (2009) 32 UNSWLJ 674 at 675-76.

¹⁷ *Ibid.*

In the landmark decision of *Re Hinde* (1816), Lord Eldon of the Court of Chancery claimed that the court's "principal duty was to the lunatic" and established a framework to govern the division of a lunatic's estate.¹⁸ After all of a lunatic's debts and expenses were paid, others – presumably the lunatic's kin – would be considered in the distribution of the estate,¹⁹ because the distribution was to be done in the manner "the lunatic himself would do, if he were in a capacity to act."²⁰ This approach, whereby the court would attempt to divide the estate in the presumed wishes of the lunatic, became known as the "substituted-judgment approach" and has been most influential in modern English law.²¹

IV

STATUTORY WILLS IN OTHER COMMON LAW JURISDICTIONS

A. ENGLAND

The United Kingdom's *Mental Health Act* (1959) established the Court of Protection.²² Since 1970 it has been assigned the responsibility of making statutory wills for incapacitated persons²³ using the substituted-judgment approach. In the case of *Re D (J)* (1982) the court established five principles that were to be followed when drafting a statutory will:²⁴

1. Patients should be assumed to have a brief lucid interval at the time the will was made;
2. During this lucid interval it should be assumed that the patient has full knowledge of the past and realizes that once the will is executed he or she will lapse back into a pre-existing mental state;

¹⁸ *Ex parte Whitbread in re Hinde, a Lunatic*, (1816) 35 Eng Rep 878 (Ch) [*Re Hinde*].

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

²² Royal College of Psychiatrists, *Seminars in Old Age Psychiatry*, (London: Gaskell, 1998) at 301.

²³ Roger Kerridge, *Parry & Clark: The Law of Succession*, 11thed (London: Sweet & Maxwell 2002) at 66.

²⁴ *Re D (J)*, [1982] 1 Ch 237.

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3. The patient must be considered, with all his or her antipathies and affections that he or she had while in full capacity, and not a hypothetical patient.
 4. The patient must be assumed to be acting reasonably and to have been advised by a competent solicitor; and
 5. In normal cases, he or she is to be envisaged as taking a broad brush to the claims on his or her bounty as opposed to an accountant's pen.²⁵

It is often the case that an incapacitated person's preferences are unknown, thereby rendering the substituted-judgment approach inapplicable. In *Re C* (1991), the patient was mentally handicapped, institutionalized from birth, and upon the death of her parents inherited a significant amount of wealth.²⁶ When drafting the statutory will, the court recognized that a subjective assessment would be untenable because the "record of the patient's preferences and personality are a blank on which nothing has been written."²⁷ The court held that in these circumstances, an objective assessment reflecting a "normal decent person, acting in accordance with contemporary standards of morality" would be more practical.²⁸ The court believed that there was a moral obligation to recognize both the community and the patient's relatives. As a result, the estate was equally divided between local mental health charities and the testator's relatives.

Implemented in 2005, the *Mental Capacity Act* has since dramatically impacted the way statutory wills are drafted in the United Kingdom. Courts are now required to administer an estate based upon the "best interests" of the incapacitated person.²⁹ A host of considerations are taken into account to make this determination, including the individual's preferences, the views of certain parties (such as a caretaker) and relevant circumstances defined in the legislation.³⁰ In *Re P*, Lewison J noted that while the courts could explore each of these considerations, they were not obligated to give

²⁵ *Ibid.*

²⁶ *Re C*, [1991] 3 ALL ER 866 (Ch).

²⁷ *Ibid* at 870.

²⁸ *Ibid.*

²⁹ *Mental Capacity Act 2005* (UK), 2005, c 9, s 4 [*MCA*].

³⁰ *MCA, ibid*, ss 4(6-7), (11).

effect to each of them.³¹ On this matter, Lewison J stated:

Counsel stressed the principle of adult autonomy; and said P's best interests would be served by giving effect to his wishes. That is, I think, part of the overall picture[,] ... But what will live on after P's death is his memory; and for many people it is in their best interests that they be remembered with affection by their family and as having done "the right thing" by their will. In my judgment, the decision-maker is entitled to take into account, in assessing what is in P's best interests, how he will be remembered after his death.³²

Accordingly, an incapacitated person's estate may be divided in a manner that might not reflect his or her preferences but rather in a manner that is reflective of judicial considerations regarding their best interests. While the development of this "best interests" standard has rendered the substituted-judgment approach less applicable today, it continues to be applied in several common law jurisdictions.

B. AUSTRALIA

Most jurisdictions in Australia allow the courts to execute statutory wills on behalf of those lacking testamentary capacity.³³ Each of these jurisdictions employs a regime whereby the courts attempt to draft a will that resembles what the incapacitated person "might," "is likely to," "could," or "would" have made – in effect the substituted-judgment approach.³⁴ While there are subtle differences between each jurisdiction, they all seek to provide courts with flexibility in the provision of statutory wills.

South Australia employs a more stringent method known as the "likely intentions" standard.³⁵ While the wording seems similar to that used in other Australian jurisdictions, it has been interpreted far more narrowly and entails a higher threshold of certainty, as seen in

³¹ *Re P*, [2009] EWHC 163 at para 41 (Ch).

³² *Ibid* at 44.

³³ This includes New South Wales, Northern Territory, Queensland, South Australia, Tasmania, Victoria and Western Australia. Martin Terrell, "Wills for persons without capacity" (2004) 154 New LJ 968 at 970.

³⁴ *Supra* note 16 at 680.

³⁵ *Wills Act 1936*, s 7(3)(b) [*South Australia Act*].

Boulton v Sanders (2004).³⁶ In this case, the claimant, Ms. Boulton, was appointed as the executor of Amy Sanders' estate, who was 90 years old and suffered from dementia. While Ms. Sanders' had an existing will, the principal beneficiary had passed away. Accordingly, the estate was to be divided in accordance with the laws of intestacy and Ms. Boulton, a longstanding family friend and executor of the estate, would receive nothing. As a result, she applied for a court-imposed statutory will. The court held that an "accurate reflection of likely intentions required a substantial degree of precision" and "if the proposed will no more probably reflects likely intentions than a number of other possible dispositions," it would not be authorized.³⁷ Despite the apparent legitimacy of Ms. Boulton's claim, the court denied it and held that the evidence did not meet the threshold for "likely intentions."

In cases where an incapacitated person's preferences are unknown, Australian courts have employed an objective approach. In *Hoffman v Waters* (2007), an application for a statutory will was sought on behalf of a young person who had lacked capacity since the age of three.³⁸ Relying on the aforementioned *Re C*, the Supreme Court of South Australia decided to draft the will so that it would be akin to that "of a kind that one would reasonably expect would be made by a young man" in his situation.³⁹

C. NEW ZEALAND

The Family Court of New Zealand has the authority to make a property order,⁴⁰ which entails the appointment of an individual ("manager") to take care of another person's property.⁴¹ The court will make such an order if it believes that the individual in question lacks the capacity to appreciate the consequences of his or her property-related decisions or if the individual has the capacity to understand the effect of his or her decisions, but is unable to communicate

³⁶ *Boulton v Sanders* (2004) 9 VR 495 (CA).

³⁷ *Ibid* at 515-16.

³⁸ *Hoffman v Waters* (2007), 98 SASR 500.

³⁹ *Ibid* at 508.

⁴⁰ *Protection of Personal and Property Rights Act 1988*, NZ 1988, no 4 s 1-15 [*Rights Protection Act*].

⁴¹ *Rights Protection Act*, *ibid*, s 31.

them.⁴² If an individual is subject to a property order, he or she will not automatically be considered incapable of making a will.⁴³ The court will examine the issue of capacity separately. If it is found upon examination that the individual does not possess testamentary capacity, the court will be empowered to pass a statutory will.

New Zealand legislation does not specify whether the court should use a subjective or objective assessment when devising a statutory will. New Zealand's common law suggests that the subjective substituted-judgment approach is considered the most appropriate.⁴⁴ The courts thus seek to consider and apply the individual's intentions and desires in accordance with the five principles established in *Re D (J)*.⁴⁵

D. NEW BRUNSWICK

In 1994, the provincial legislature of New Brunswick amended the existing *Infirm Persons Act*,⁴⁶ providing the Court of Queen's Bench the authority to make, amend or revoke a will on behalf of a mentally incompetent individual.⁴⁷ In doing so, New Brunswick became the first and only Canadian province to allow its judiciary to execute statutory wills.

The Act states that the courts of New Brunswick may draft a statutory will "where [it] believes that, if it does not exercise [its] power, a result will occur on the death of the mentally incompetent person that the mentally incompetent person, if competent...would not have wanted."⁴⁸ The court is thus required to employ the substituted-judgment approach when possible, similar to its counterparts in New Zealand and parts of Australia. In making subjective assessments, the Court of Queen's Bench has relied on principles established in English case law, including *Re D (J)*,⁴⁹ and

⁴² *Rights Protection Act*, *ibid*, s 6(1).

⁴³ *Rights Protection Act*, *ibid*, ss 2, 54, 55.

⁴⁴ *Re Manzoni (A Protected Person): Kirwan v Public Trustee*, [1995] 2 NZLR 498 at 505 (HC).

⁴⁵ *Ibid*.

⁴⁶ *Infirm Persons Act*, RSNB 1973, c I-8 [IPA].

⁴⁷ IPA, *ibid*, s 3(4).

⁴⁸ IPA, *ibid*, s 11.1(1).

⁴⁹ *Re M (Committee of)* (1998), 27 ETR (2d) 68 at 77 (NB QB).

determines personal interests through the individual's social interactions.⁵⁰ A subjective assessment is also applied when an individual has been incapacitated throughout their entire life.

Before granting leave for a statutory will, the court must be satisfied that the person in question is mentally incompetent. However, in addition to an individual being declared mentally incompetent, the court may also create, change or revoke a will on behalf of anyone found to be incapable of handling his or her affairs "through mental or physical infirmity arising from disease, age or other cause, or by reason of habitual drunkenness or the use of drugs."⁵¹ In this regard, New Brunswick differs from the United Kingdom, Australia and New Zealand, as each requires a finding of testamentary incapacity before proceeding with a statutory will application.

V

ARGUMENTS IN FAVOUR

A. INTESTACY MAY CAUSE UNDESIRABLE OR UNJUST CONSEQUENCES

An incapacitated person may have once possessed testamentary capacity, but during that period may not have made a will; others may have lacked capacity since birth or childhood. Individuals in both groups will die intestate. In Ontario, the laws of intestacy would govern the division of their estate.⁵² In certain circumstances this may produce an objectionable outcome, as demonstrated by the two examples below.

First, assume that a newly married couple has a child named Bob. Bob is particularly adored and loved by his elderly grandfather, who lives in a retirement home. Unfortunately, Bob's parents do not share these feelings of affection and he becomes a victim of physical abuse which leaves Bob severely disabled. Upon learning of this abuse, social services place Bob in foster care, where he receives significant

⁵⁰ Eric L Teed, Q.C. and Nicole Cohoon, "New Wills for Incompetents" (1996), 16 ETJ 1 at 2.

⁵¹ *Ibid* at 79.

⁵² *SLRA*, *supra* note 1, ss 44-49.

attention and assistance from the staff. Shortly thereafter, Bob's grandfather passes away and in his will bequests his entire estate to Bob. At age 19, Bob's mental condition worsens and he dies before his parents, leaving no dependents. In Ontario, due to the absence of a statutory will-making scheme, Bob would die intestate. Due to the fact that he did not have a spouse nor any issue, Bob's parents would equally benefit from his estate. Such a result would be repugnant, unconscionable and almost certainly contradict what Bob would have done had he possessed capacity. This demonstrates the limitations of the existing law and, more importantly, demonstrates how the administration of justice could be brought into disrepute.

In the hypothetical situation provided above, an undesirable outcome could have been avoided through a scheme allowing for statutory wills. Since Bob lost capacity at a young age, his intentions and inclinations would not be known. Therefore, when drafting a statutory will, a court could employ an objective approach and determine how a reasonable person in Bob's situation would dispose of his or her estate by examining the facts and circumstances of the case. By utilizing this approach, it is more likely that Bob's estate would be devised in a manner consistent with his presumed intentions.

Second, by allowing an incapacitated person's estate to be divided in accordance with the existing laws of intestacy, individuals and organizations can often be wrongfully overlooked. An individual lacking capacity, for instance, may have blood relatives with whom he or she has no meaningful or even a neglectful and abusive relationship. As a result, this individual's only form of support may come from a non-family caretaker, such as a volunteer or employee at a mental health care facility. This can be problematic because the caretaker would not have a claim on intestacy.⁵³ Furthermore, it is uncertain whether the caretaker would have a claim under dependents relief legislation. In *Perilli v Foley Estate*, the Ontario Superior Court held that non-dependents could inherit a share of the estate based on their moral and legal claims.⁵⁴ While this decision seemed progressive, it has not had much influence or impact in remedying the problem at hand. In contrast, a statutory will-making

⁵³ *SLRA*, *supra* note 1, ss 44-49.

⁵⁴ *Perilli v Foley Estate*, [2006] 23 ETR (3d) 245.

scheme would definitively allow courts to recognize the care and service provided by a non-dependent, thereby removing any uncertainty and potential injustice from ensuing.

B. STATUTORY WILLS CAN CORRECT OUTDATED WILLS

Competent persons may lose testamentary capacity and circumstances may change in such a way that results in a will no longer reflecting the wishes of the testator. Consider the following: John and Jane are married and have two children. In her will, Jane leaves her entire estate to John and the remainder to their children. A decade into the marriage Jane learns that John has been having an affair and is devastated. She proceeds to file for divorce and orders a restraining order against John. Unable to cope with the circumstances, Jane shortly thereafter commits suicide without updating her will. In Ontario, the law would likely apply in an inflexible and mechanical manner. Despite all the evidence indicating that Jane would not have wanted her estate to pass on to John for life, this would be the probable result. Such an outcome illustrates a gap within the law that allows for counter-intuitive and perverse outcomes. Accordingly, empowering courts to pass statutory wills would effectively address these problems by allowing the law to operate in a more predictable and logical manner, both of which are important characteristics to a fair and just legal system.

C. STATUTORY WILLS PROVIDE EQUAL FOOTING & TESTAMENTARY FREEDOM

A statutory will-making scheme would advance the rights of those who do not possess testamentary capacity. Currently, an Ontarian who lacks capacity is deprived of the opportunity to determine how his or her estate will be divided. Statutory wills would allow these people to be placed “on a more equal footing in terms of will-making.”⁵⁵ As seen in jurisdictions that allow for statutory wills, courts will tailor its analysis and decision to the individual in

⁵⁵ Robert D Nicholson, “Waving the Magic Wand: Solving Key Legal Issues Relating to Intellectual Disability”, (1995) 2 Journal of Law and Medicine 270 at 285.

question. All relevant information known about the incapacitated testator is considered and the estate is divided in a manner that is aimed to be more reflective of the testator's intent. Through this process, those who were close to and who provided assistance to the incapacitated person would typically be rewarded as beneficiaries of the estate while potential beneficiaries who were neglectful or abusive may receive far less than expected.

VI

ARGUMENTS AGAINST

A. STATUTORY WILLS ARE PATERNALISTIC

Neville Crago, Eric Teed and Nichole Cohoon affirm that statutory wills are paternalistic.⁵⁶ The latter two note that statutory wills provide the judiciary with too much discretion, freedom, and power.⁵⁷ Accordingly, the courts are able to interfere with a person's estate and determine how it should be divided.⁵⁸ Since the individual is incapacitated, the distribution takes place without their knowledge.⁵⁹ According to Teed and Cohoon, this represents "another example of the Big Brother syndrome" that should be prohibited rather than promoted.⁶⁰

It is important, however, to distinguish between statutory wills that employ a substituted-judgment approach versus a best-interests standard. The argument put forward by these scholars holds little force in the context of statutory wills that apply the subjective substituted-judgment approach, where the wills are designed to reflect the intentions of the incapacitated person. When drafting these wills, the court does not attempt to impose any beliefs or values regarding how the estate should be divided, but rather attempts to provide autonomy to the individual. Therefore, it is reasonable to

⁵⁶ Neville Crago, "Reform of the Law of Wills", (1995) 25 Western Australian Law Review 255 at 258.

⁵⁷ *Supra* note 50 at 3.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

conclude that statutory wills that apply a substituted-judgment approach are not paternalistic but rather are respectful of the individual's autonomy.

Some jurisdictions that employ the substituted-judgment approach allow for objective assessments (i.e. that of the reasonable person) when the interests and inclinations of an individual lacking capacity are indeterminable. Such objective assessments are used infrequently and are typically applied when an obvious injustice would result in the absence of a statutory will. Since the objective approach is seldomly used and only in urgent situations, it tempers any paternalism-related concerns. On the other hand, the same does not hold true for the best-interests standard, as used in the United Kingdom. The court's authority seemingly prevails over the individual's autonomy. Thus, the concerns regarding paternalism may be justified.

B. THE LAW IN ONTARIO IS SUFFICIENT

It may be argued that developments in the common law have provided Canadian courts with sufficient authority to prevent and resolve any injustices that may arise in the administration of an incapacitated person's estate. Thus, the argument holds a statutory will-making scheme is simply unnecessary.

To determine the strength of this argument, it is necessary to examine relevant common law developments. In *Cleaver et al v Mutual Reserve Fund Life Association* (1892)⁶¹ the English court held that the law prohibits a criminal from benefiting from his or her wrongdoing.⁶² This rule was adopted in Canada and bears relevance to the issue at hand because it can be used to extinguish the rights of a beneficiary without relying on a statutory will.⁶³ This can be illustrated through the South Australian case, *De Gois v Korp*.⁶⁴ In this case, Mr. Korp was charged with the attempted murder of his wife.

⁶¹ *Cleaver et al v Mutual Reserve Fund Life Association*, [1892] 1 QB 147 (CA).

⁶² *Ibid* at 156-57.

⁶³ Norman M Tarnow, "Unworthy heirs: The Application of the Public Policy Rule in the Administration of Estates" in Robert C Dick, ed, *Estates and Trusts Quarterly* 377 at 377-83.

⁶⁴ *De Gois v Korp*, [2004] 1 VSC 450.

While he was not successful, his wife was severely injured and eventually lost testamentary capacity. In her will, she had left everything to Mr. Korp. The South Australian court exercised its statutory will-making authority and removed Mr. Korp as a beneficiary. In Canada, however, a statutory will would not be necessary. Since Mr. Korp would profit from his criminal act, the rule of public policy would be invoked and as a result, he would be removed as a beneficiary of the estate.

The second development took place in *Cummings v Cummings*.⁶⁵ In this decision, the Ontario Court of Appeal examined how a dependent's relief claim should be assessed and quantified. The Court held that the legal and moral obligations between the deceased and the dependent must be considered before determining whether adequate support was provided.⁶⁶ Prior to the *Cummings* decision, moral obligations were not considered in a dependent's relief claim. However, with the inclusion of moral considerations a person's estate can be devised in a more equitable manner. This process can help protect dependents of an incapacitated individual from suffering grave injustices.

The common law developments prevent the occurrence of certain injustices. However, they are far too limited in their scope to effectively substitute for a statutory will-making scheme. The general rule of public policy only allows the removal of a beneficiary if he or she has profited from a criminal act (i.e. murdering a testator). However, if a non-dependent beneficiary indirectly caused a person to lose capacity (i.e. by putting them through unbearable emotional pain) or if they acted cruelly towards the incapacitated person but remained within the bounds of the law, the rule would not apply. The beneficiary would therefore inherit at least a portion of the estate, even if it were clear that the incapacitated person would have opposed such an outcome. While the decision in *Cummings* provided the courts with greater authority, it was confined to dependent relief claims and would not be able to resolve these predicaments.

⁶⁵ *Cummings v Cummings*, (2004) 69 OR (3d) 397 (Ont CA) [*Cummings*].

⁶⁶ *Ibid* at para 50.

C. A Scheme Facilitating Statutory Wills is Philosophically
Irreconcilable

Crago claims that the concept of a statutory will is foreign “to the philosophy that has always informed wills legislation in Anglo-Australian law. The courts have always emphatically disclaimed any jurisdiction to make a will or any part of a will for a testator.”⁶⁷ While one could contend that Crago’s argument applies to Ontario, existing Ontario legislation does not seem to support such a claim. For instance, following the *Cummings* decision, the judiciary has been provided with greater freedom and authority to restructure the distribution of an estate for the purposes of adequately providing for a dependent beneficiary.⁶⁸ Nevertheless, even if Crago’s argument is accepted, it should not be afforded much weight. An individual who is born without capacity does not choose to die intestate. Likewise, a person who possessed capacity but loses it later on in life would not choose to leave his or her will outdated. These individuals are robbed of this choice because they lack testamentary capacity. The availability of a statutory will restores their choice and helps prevent unjust results. Therefore, the clear need and obvious benefits that result from instituting a statutory will-making scheme outweigh the claim that the scheme is a foreign concept.

VII
PROPOSAL

Ontario courts should be given the power to impose a statutory will on behalf of an individual who lacks testamentary capacity. While many of the specific and technical details of such a scheme are difficult to conclude concretely, there are several key elements that should be recognized as acceptable. Firstly, it seems appropriate to employ a substituted-judgment approach. In applying the approach the court attempts to make a decision akin to that of the incapacitated person, assuming he or she possessed capacity. This approach is preferred over the best interests standard used in England,

⁶⁷ *Supra* note 56 at 260.

⁶⁸ *Cummings*, *supra* note 65.

since it does not give the court the authority to prioritize its own views above that of the incapacitated person and thus avoids charges of being overtly paternalistic.

Secondly, in certain circumstances, an incapacitated person's preferences will be unknown. In such situations an objective approach should be applied (i.e. what a "reasonable" person would do in the given situation). An objective approach is more preferable than attempting to determine an incapacitated person's intentions or inclinations, as they may not be consistent.

Lastly, the language that is to be used in the substituted-judgment approach should be carefully selected. The courts should not attempt to make a decision akin to the "likely intentions" of the incapacitated person. Based upon the case law in Australia, the term "likely intentions" is interpreted in a strict manner and imposes an overly high threshold. As a result, it can prevent a statutory will from being applied in a number of urgent situations, thereby defeating its purpose. A more flexible formulation would be appropriate, and should strive to determine what a normal person "would" choose to do if he or she were not incapacitated.